DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-093

Xxxxxxxxxxx
xxxxxxxxxx

FINAL DECISION

[redacted]

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application on April 15, 2005, upon receipt of the completed application.

This final decision, dated February 8, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record to show that he was found not fit for duty during a physical examination on December 1, 2004. The examination was conducted by order of the BCMR in Docket No. 2004-053. The applicant desires to be evaluated by a medical board and processed under the Physical Disability Evaluation System (PDES) for a discharge or retirement by reason of physical disability. The applicant alleged that the physical examination he received from Dr. N, a Navy doctor, pursuant to the Board's order was "perfunctory and deficient." He submitted a copy of another physician's report dated January 12, 2005, to rebut the finding of fitness.

SUMMARY OF PRIOR CASE

In BCMR Docket No. 2004-053, the applicant asked the Board to reinstate him on active duty in the Coast Guard as of the date of his release, June 30, 2002, so that he could be evaluated under the PDES for injuries he incurred in a motorcycle accident while serving on extended active duty on January 25, 2001. He alleged that because of those injuries, which included three broken ribs and a fractured clavicle, he developed

chronic paravertebral spasms and ulnar neuropathy in his elbow. However, instead of being evaluated by an Initial Medical Board (IMB), processed under the PDES, and medically separated or retired, he was administratively separated (released from active duty into the Reserve) when his active duty contract expired on June 30, 2002.

The applicant alleged that, before his date of discharge, his Coast Guard doctor, Dr. R, recognized his condition but refused to process him under the PDES because he was performing his assigned duties. Dr. R decided that because he was performing his duties, he was "fit for duty" and not entitled to PDES processing under Article 2.C.2.b. of the PDES Manual. However, Dr. R also noted on a medical board report dated July 1, 2002, that the applicant's "prognosis is unknown" and that he "advised the evaluee to avoid ladders and strenuous activity pending further elucidation of the medical problem." The applicant alleged that Dr. R's comments were inconsistent with his finding of "fit for duty." Because Dr. R found the applicant fit for duty, the report he prepared was not processed. The applicant alleged that he was not fit for duty upon his release from active duty on June 30, 2002, and that the presumption of fitness for duty "does not apply where as here the disabilities were long standing, were refractory to medication, were degenerative and finally interfered with [his] ability to perform his duties," as shown by the limitations Dr. R placed on his activity.

The Judge Advocate General (JAG) of the Coast Guard recommended that the Board grant the applicant alternative relief. He alleged that Dr. R had acted in accordance with PDES policy by not processing a member who was performing his duties and slated for release from active duty for a reason other than his medical condition. The JAG stated, however, that conducting a physical examination to discover the applicant's current medical status and to determine whether additional corrective action is justified would be in the interest of justice. The JAG argued that if the applicant is "currently not fit for full duty, then it is appropriate to evaluate him for separation and also to revisit his status at the time of his [release] from active duty."

The JAG based his recommendation on a memorandum on the case prepared by CGPC. CGPC alleged that although the applicant took sick leave to attend physical therapy, there "is no evidence of extensive periods of absence from work to convalesce as a result of his medical condition." Moreover, CGPC noted that the applicant continued to perform active duty and did not request PDES processing until approximately seventeen months after his accident and one month prior to his scheduled release from active duty. Therefore, CGPC argued, "the provisions of Article 2.C.2.b. of the PDES Manual were appropriately applied to his circumstances."[1]

---

[1] Chapter 2.C.2.b. of the PDES Manual provides that the Coast Guard's own "disability evaluation system [is] not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotion, and continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service." Chapter 2.C.2.b.(1) provides that "[c]ontinued performance of duty

CGPC stated that the applicant objected to his doctor's finding of fitness and requested review by a higher authority. CGPC stated that the applicant's requests were twice reviewed "and given due consideration in accordance with current policies." CGPC stated that the "record contains evidence that an IMB was initiated on the Applicant …, but was not completed. The local medical authority may have been initially supportive of the Applicant's position that an IMB was warranted. However, this partially completed IMB supports evidence that the medical authority found the Applicant fit for duty."

CGPC stated that although the Coast Guard "acted appropriately in separating the Applicant in a fit for duty status, I believe there is reasonable uncertainty that the Applicant remains in this status. The record indicates that his condition may have been slowly declining at the time he left active duty (though not to the point that his performance was affected)." CGPC stated that the applicant is currently a civilian employee of the Coast Guard and a member of the IRR and recommended that the Board order the Coast Guard to conduct a physical examination of the applicant. CGPC stated that, if the examination revealed no currently disabling conditions, no corrections to his record would be made. CGPC stated that if the applicant was found to have a disabling condition, the Coast Guard would convene an IMB and, if the IMB determined that the applicant was not fit for duty on June 30, 2002, the Coast Guard would process the applicant in accordance with the PDES "for possible separation or retirement due to physical disability." CGPC noted that if the IMB found that the applicant was fit for duty on June 30, 2002, but is no longer fit for duty, he would be processed for discharge from the Reserve.

The BCMR noted that Dr. R's finding that the applicant was fit for duty and for separation in June 2002 and that he was not entitled to evaluation by an IMB was entitled to a presumption of regularity.[2] The Board noted that during the seventeen months prior to his release from active duty, the applicant had complained of back pain and numbness in his left arm and fingers, yet he had continued to work regularly and took sick leave to attend medical appointments. Moreover, the applicant had neither alleged nor proven that his symptoms caused him to miss many days at work or that they significantly interfered with his performance of his assigned duties. The Board noted that in May 2002, Dr. R had reported that although the applicant had chronic pain, he "is able to work daily and has no deployment limits," which supported Dr. R's determination that the applicant was fit for duty, as defined in Chapter 2.A.15. of the PDES Manual. The Board also noted, however, that in June 2002, Dr. R began to

---

until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty."

[2] 33 C.F.R. § 52.24(b). *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that "absent strong evidence to the contrary," government officials are presumed to have acted "lawfully, correctly, and in good faith").

prepare an IMB report for the applicant, which suggested that at one point Dr. R had substantial doubts about the applicant's fitness for duty. In addition, the Board noted that, at the time of the applicant's release from active duty, Dr. R advised him to "avoid ladders and strenuous activity pending further elucidation of the medical problem." Therefore, although the applicant was performing his duties, which consisted of deskwork, the Board found that he might not have been fit for the more strenuous duties of his rank.

The Board found that the applicant's case clearly fell within the parameters of Chapter 2.C.2.b., because he continued to perform his assigned duties adequately while tolerating his physical impairments, and there was no evidence of "acute, grave illness or injury, or other deterioration of [his] condition … immediately prior to or coincident with processing for separation." The Board also noted that service-related medical conditions that become disabling after separation or retirement are properly handled by the disability evaluation system of the Department of Veterans' Affairs.

The Board concluded that the applicant had not proved by a preponderance of the evidence that Dr. R erred in finding him fit for duty and release or that Dr. R erred in not processing him under the PDES. However, the Board found that Dr. R had substantial doubts about his fitness for duty prior to his release and that he was suffering from significant impairments that might have interfered with his performance of duty in a more physically demanding assignment. Therefore, the Board agreed with the Coast Guard and ordered it to conduct a physical examination of the applicant and, if indicated, process him under the PDES.

SUMMARY OF THE RECORD

From 1990 to 1999, the applicant completed almost ten years of active duty as an officer in the Coast Guard. He resigned and was honorably separated on August 30, 1999. However, he joined the Reserve and on May 1, 2000, began serving on an extended active duty contract with a term of two years and two months.

On [redacted] the applicant fell off his motorcycle when he hit a curb. Hospital xrays showed "a comminuted left mid clavicular fracture, as well as multiple fractures involving the 4th, 5th, and 6th ribs," but no injuries to the spine or brain. He was placed in a limited duty status.

On February 2, 2001, the applicant sought treatment for pain in the upper thoracic area and his left elbow. Xrays of the elbow were "negative." A CT scan of the thoracic spine on February 7, 2001, showed no fracture but noted "mild marginal osteophyte formation anteriorly in the upper thoracic region."

While still in a sling in February 2001, the applicant began complaining of pain in his upper and mid back. The doctor noted that he was taking Motrin and Vicodin for pain and that the Flexeril he had prescribed for the applicant's back spasms did not seem to help. The doctor prescribed Skelaxin for the back spasms and referred the applicant to a physical therapist. On February 27, 2001, the applicant also complained of swelling in the ulnar aspect of his left wrist. At a follow-up examination on March 23, 2001, the applicant was found to be doing well, as he had "essentially no pain over the left clavicle" and an xray showed "excellent callus formation." He was released from further care, but on April 20, 2001, he requested chiropractic treatment, which was authorized.

Throughout 2001 and 2002, the applicant continued his chiropractic care and physical therapy. He also continued to work full time and used sick leave to attend medical appointments. He reported continuing symptoms, including back spasms; pain in his upper back, neck, and left shoulder; and tingling in his left arm. He reported that work aggravated his symptoms because he sat at a computer most of the time.

Beginning in November 2001, the applicant complained of loss of feeling in his left arm and fingers and on the left side of his back. He stated that he continued to have pain where his ribs had broken and muscle spasms near the scapula.

On January 7, 2002, the applicant told a doctor that his arm symptoms had continued, with intermittent numbness in two left fingers and sometimes the entire arm. The doctor referred him to an orthopedist. On January 28, 2002, the orthopedist reported that the applicant had developed numbness in his left forearm and ring and little fingers and complained of some continuing pain and occasional tingling "in the left side of the thoracic cage." The orthopedist provisionally diagnosed the applicant with an "ulnar neuropathy at the elbow"[3] and referred him to a neurologist for "consultation and consideration of nerve conduction studies."

On March 13, 2002, a neurologist reported that the applicant was still complaining of intermittent back and neck pain and numbness and tingling in his left arm and fingers. On April 24, 2004, following electrodiagnostic studies of the left arm, the neurologist diagnosed the applicant as having a "left ulnar neuropathy at the elbow." On May 6, 2002, xrays of the applicant's shoulder and left wrist were "normal." The applicant's orthopedist recommended that he seek help at a pain clinic because, he stated, he did "not believe that there are any further orthopedic interventions to consider." The orthopedist stated that the applicant's primary complaint was "pain and

---

[3] Ulnar neuropathy is a functional disturbance of the ulnar nerve. The ulnar nerve is a general sensory and motor nerve that begins at the spine in the C7-T1 area (bottom of the cervical spine and top of the thoracic spine) and distributes to the skin on front and back of the medial part of hand, some flexor muscles on the front of the forearm, many short muscles of the hand, the elbow joint, and many joints of the hand. *Dorland's Illustrated Medical Dictionary* (29th ed. 2000), pp. 1204, 1212.

paresthesia [numbness] radiating around his left lateral chest wall," which likely resulted from his broken ribs.

On May 8, 2002, Dr. R noted that the applicant consulted him about "his future in the USCG." The doctor noted that he had chronic pain but "is able to work daily and has no deployment limits."

On May 14, 2002, the applicant told a doctor that he was frustrated by his continuing symptoms and felt depressed. He reported feeling a burning sensation in his left shoulder and discomfort in the left thoracic back, which he described as "hot, burning, and searing." He also reported muscle spasms in his left back and shoulder blade area. The doctor diagnosed him with chronic thoracic pain, secondary to his motor vehicle accident, and depression.

On June 12, 2002, the applicant requested an IMB. Dr. R noted the applicant's continuing physical complaints, referred him to a pain clinic, ordered another MRI, and recommended regular deep water therapy and pain management therapy, but also noted that he was "fit for discharge based upon [Article] 2.C.2.b. per [Dr. J]."

On June 18, 2002, the applicant's command asked CGPC to extend his contract for three months for unstated medical reasons. On June 19, 2002, CGPC denied the request. CGPC stated that the applicant was presumed fit for duty absent "a serious injury, illness, or disease discovered upon separation processing or which has been aggravated by active service and would otherwise lead to termination of service with physical disability." CGPC noted that it had offered the applicant another two-year contract, which he had not yet signed.

On June 26, 2002, the applicant sent a letter to CGPC requesting a ninety-day extension so that he could be processed under the PDES and complete medical appointments. His commanding officer strongly supported his request. On June 28, 2002, CGPC denied the request, citing the message of June 19, 2002, and stating that a "further discussion with the [Executive Officer of the applicant's unit] on 27 Jun 2002 indicates an IMB will not be submitted." CGPC stated that if the applicant wanted to continue in his position, the minimum term of extension allowed was twelve months. The applicant replied by fax the same day. He wrote that he was "not physically able to complete an active duty extension of 12 months"; that he "was told by [Dr. R that] both a separation physical and medical board would be initiated 28 Jun 02"; and that, although CGPC had indicated that he was being denied a medical board, he was currently at the clinic for completion of the medical board. A copy of a Report of Medical History form that the applicant filled out on June 28, 2002, shows that he checked "Medical Board" as the purpose of the examination.

On June 28, 2002, Dr. R completed the applicant's physical examination. His report indicates that it was conducted because of the applicant's upcoming release from active duty (not pursuant to a medical board). Dr. R noted that the applicant had a full range of motion in his left shoulder, elbow, and wrist but tender sites and paresthesia around the mid thoracic spine and left scapula, "hypoaesthesia l. ulnar distribution,"[4] and "chronic pain and residual neuropraxia."[5] Dr. R recommended that the applicant continue treatment at a pain clinic and seek physical therapy and deep water exercise. However, he also noted that the applicant was fit for duty or for separation.

At some point, Dr. R completed an undated IMB report in which he found that the applicant's medical conditions included "para-spinous and peri-scapular pain coupled with 'depression' and sleep maintenance disorder [that] are suspicious for a Myofascial Syndrome," and "left cubital tunnel syndrome (mild and related to the [motor vehicle accident])." Dr. R also wrote that the applicant's "prognosis is unknown" but that he was fit for full duty and for release from active duty. Dr. R also noted that he "advised the [applicant] to avoid ladders and strenuous activity pending further elucidation of the medical problem." In addition, Dr. R noted that "recommended evaluations are in abeyance" because the applicant "elected to separate from the military."

On June 30, 2002, the applicant was honorably released from active duty into the Individual Ready Reserve (IRR).

On July 2, 2002, the applicant signed a statement indicating that he did not agree with Dr. R's findings. He also wrote that he had never recovered from his accident and that he had been denied a medical board.

New Medical Records Not Considered in BCMR Docket No. 2004-053

On December 1, 2004, the applicant underwent a physical examination at a Navy hospital pursuant to the Board's order in Docket No. 2004-053. Dr. N reported that the applicant is "not sure why he is here. Apparently had complicated med board and discharge from Coast Guard last year, and was told to get repeat physical to document his current status. … He says he currently has pain in back and most of his muscles ache on a regular basis. He also notes depressive [symptoms], and allergic rhinitis." Dr. N wrote that the applicant complained of intermittent tingling in his shoulder where it had been fractured and "chronic muscle pain and aches" but had "no problems with

---

[4] Hypoaesthesia is reduced feeling or sensation. *Dorland's Illustrated Medical Dictionary* (29th ed. 2000), pp. 623, 860.

[5] Ulnar neuropraxia is a loss of conduction in an intact ulnar nerve. *Dorland's Illustrated Medical Dictionary* (29th ed. 2000), p. 1449.

motion or strength in arms or legs, [or] trouble with balance or gait." Tests showed that the applicant had a free range of motion and normal sensation in his extremities. Dr. N wrote that the applicant "has multiple complaints and an unusual history, but his exam today seems normal. Most of his complaints are subjective. No objective findings today. He is apparently being seen by a rheumatologist with a diagnosis of myofascial pain syndrome. He is of course on several medicines that may be masking his symptoms." The applicant's medications were listed as Skelaxin, Prozac, Lodine, Claritin, Flonase, Neurontin, and Maxalt. Dr. N released the applicant without limitations.

On December 2, 2004, in response to a query from CGPC as to the applicant's fitness for duty, a lieutenant at the Navy hospital stated, "I just spoke with [Dr. N] and his response to your question is in this form: If [the applicant] showed up today to gain entrance to the Coast Guard, he would not advise that he be admitted to the service based upon his numerous complaints that can't be supported with physical findings on his exam. On the other hand, if [the applicant] were on active duty today and getting out tomorrow, he WOULD NOT recommend a Medical Board to evaluate him; he would indicate that [the applicant] is medically eligible to separate." On March 17, 2005, in response to another query from CGPC, the lieutenant reported that Dr. N stated that if the applicant had been on active duty at the time of the physical examination, Dr. N would have found him fit for duty.

On January 12, 2005, the applicant's private physician, Dr. A, wrote that he had been treating the applicant for one year for chronic mechanical thoracic back pain, left ulnar neuropathy, hearing loss and tinnitus, migraine headaches, and depression. Dr. A wrote that he had prescribed the applicant Neurotin for pain and neuropathy; Skelaxin, as needed, for back pain and muscle relaxation; anti-inflammatories such as Vioxx and Naproxen; Maxalt for migraine headaches; and Prozac for depression associated with chronic pain. Dr. A stated that the applicant had tried physical therapy, injections of cortisone, and an electronic muscle stimulator for his back pain. Dr. A stated that the applicant "has chronic mechanical back pain, left ulnar nerve neuropathy, sensorineural high frequency hearing loss, and frequent migraine headaches." He also noted that the applicant has received a 30% combined disability rating from the DVA.

On June 20, 2003, the DVA awarded the applicant a 30% combined disability rating, including 10% for depression, 10% for tinnitus, 10% for headaches, and 0% (zero) for ulnar neuropathy and for healed fractures of his fourth, fifth, and sixth ribs and fracture of his left clavicle. The ratings for tinnitus and headaches were "continued" as they had already been granted following the applicant's discharge in 1999. The DVA stated that the ulnar neuropathy received a 0% rating because the applicant's DVA examination revealed "no current functional deficit" and because a nerve conduction study showed that his condition was mild. The DVA stated that the applicant received a 0% rating for his healed clavicle fracture because the DVA examination revealed "no range of motion deficit and no pain, fatigue, weakness, lack of endurance or incoordina-

tion on ranging"; because a "[n]eurological examination shows no deficit"; and because xrays showed that the fracture had healed with no malunion or nonunion. The DVA stated that the applicant received a 0% rating for his rib fractures because xrays showed that the fractures were healed and the DVA examination found "no functional impairment." The DVA granted the applicant a 10% rating for depression because his examination revealed "mild symptomatology" and because "depression" was noted in his service medical records although there were no psychiatric records.

On October 14, 2005, the DVA notified the applicant that it would consider his appeal of the assigned ratings.

VIEWS OF THE COAST GUARD

On September 2, 2005, the JAG recommended that the Board deny the applicant's request. He stated that the applicant was examined by a Navy doctor who found him fit for duty. The JAG argued that "[w]hile Applicant's civilian doctor addresses Applicant's medical conditions, he does not address Applicant's fitness of duty. Regardless, it is the military doctor who has the greater expertise in making a fitness for duty determination."

The JAG attached to his advisory opinion and adopted a memorandum on the case prepared by CGPC. CGPC stated that after Dr. N completed his report, he confirmed by email that the applicant was fit for duty. CGPC stated that the applicant has not proved that Dr. N's examination was cursory or deficient. CGPC stated that "Dr. N's evaluation took the Applicant's medical history and current diagnosis under consideration and found that at the time of his evaluation, his physical condition would not preclude him from performing military duties." CGPC stated that it does not dispute the fact that the applicant continues to have physical ailments but argued that he has not proved that on June 30, 2002, he "suffered from a condition that would have prevented him from maintaining a fit for full duty status or rendered him unable to perform military duties."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 11, 2005, the applicant responded to the views of the Coast Guard. He repeated his allegation that at the time of his release from active duty on June 30, 2002, he was unfit for duty. He pointed out that Dr. N noted that his medications may have been masking his conditions during the physical examination on December 1, 2004. He reminded the Board that the DVA has awarded him a 30% disability rating.

SUMMARY OF APPLICABLE LAW

Disability Statutes

Title 10 U.S.C. § 1201 provides that a member who is found to be "unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay" may be retired if the disability is (1) permanent and stable, (2) not a result of misconduct, and (3) for members with less than 20 years of service, "at least 30 percent under the standard schedule of rating disabilities in use by the Department of Veterans Affairs at the time of the determination." Title 10 U.S.C. § 1203 provides that such a member whose disability is rated at only 10 or 20 percent under the schedule shall be discharged with severance pay.

Provisions of the Personnel Manual

Article 12.A.10.b. states that "[a]n officer being separated shall schedule any necessary physical examination so it is completed at least 60 days before the effective date of separation or release, although Commander (CGPC-opm) will not delay a separation or release date solely because the officer failed to complete a scheduled physical examination. A scheduled separation or release date may be delayed only if a question exists about a member's unfitness for continued service so as to require convening a medical board under the [PDES] … ."

Article 12.A.10.f. provides that if an officer's physician finds that he is qualified for separation or release, and the officer objects, the medical record and any statement submitted by the officer are forwarded to CGPC for review.

Provisions of the Medical Manual (COMDTINST M6000.1B)

Article 3.F. of the Medical Manual provides that members with medical conditions that are disqualifying for retention in the Service shall be referred to an IMB by their commands. Article 3.F.12. provides the minimum ranges of motion that each party of the body must have for retention on active duty. Article 3.F.15.n.(1) states that neuralgia (nerve pain) may be disqualifying when "symptoms are severe, persistent, and not responsive to treatment." Article 3.F.15.n.(2) states that neuritis (inflammation of a nerve causing pain and numbness) may be disqualifying when "manifested by more than moderate, permanent functional impairment." Article 3.F.13.c. provides that back pain caused by a herniated disc may be disqualifying if there are "[m]ore than mild symptoms following appropriate treatment or remediable measures, with sufficient objective findings to demonstrate interference with the satisfactory performance of duty." Article 3.A.19.c.(1) states that myofascial syndrome may be disqualifying "when not controlled by medication or with reliably diagnosed depression."

Article 3.D. contains the physical standards for enlistment, which are more stringent than the physical standards for retention listed in Article 3.F. Article 3.D.34. states that that any "[c]omplaint of a disease or injury of the spine or sacroiliac joints with or without objective signs, that has prevented the individual from successfully following a physically active vocation in civilian life, or that is associated with pain referred to the lower extremities, muscular spasms, postural deformities, or limitation of motion" may cause a candidate to be rejected for enlistment or appointment. Article 3.D.27.h. provides that "[p]aralysis, weakness, lack of coordination, chronic pain, or sensory disturbances" are causes for rejection.

Article 3.F.1.c. of the Medical Manual states that members "are ordinarily considered fit for duty unless they have a physical impairment (or impairments) which interferes with the performance of the duties of their grade or rating. A determination of fitness or unfitness depends upon the individual's ability to reasonably perform those duties."

Article 3.B.5. provides that when an officer objects to a finding of qualified for separation or release, CGPC will review the record to make a final determination as to whether the officer will be separated or processed under the PDES.

Article 3.B.6. provides that "[w]hen a member has an impairment (in accordance with section 3-F of this Manual) an Initial Medical Board shall be convened only if the conditions listed in paragraph 2-C-2.(b) [of the PDES Manual] are also met. Otherwise the member is suitable for separation."

Provisions of the PDES Manual (COMDTINST M1850.2C)

Chapter 2.A.15. of the PDES Manual defines "fit for duty" as "[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating."

Chapter 2.A.38. defines "physical disability" as "[a]ny manifest or latent physical impairment or impairments due to disease, injury, or aggravation by service of an existing condition, regardless of the degree, that separately makes or in combination make a member unfit for continued duty."

Chapter 2.C.2. states the following:

> b. The law that provides for disability retirement or separation (10 U.S.C., chapter 61) is designed to compensate members whose military service is terminated due to a physical disability that has rendered him or her unfit for continued duty. That law and this disability evaluation system are not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have theretofore drawn pay and allowances, received promotions, and continued on unlimited active

duty status while tolerating physical impairments that have not actually precluded Coast Guard service. The following policies apply.

(1) Continued performance of duty until a service member is scheduled for separation or retirement for reasons other than physical disability creates a presumption of fitness for duty. This presumption may be overcome if it is established by a preponderance of the evidence that:

(a) the member, because of disability, was physically unable to perform adequately in his or her assigned duties; or

(b) acute, grave illness or injury, or other deterioration of the member's physical condition occurred immediately prior to or coincident with processing for separation or retirement for reasons other than physical disability which rendered the service member unfit for further duty.

(2) A member being processed for separation or retirement for reasons other than physical disability shall not be referred for disability evaluation unless the conditions in paragraphs 2.C.2.b.(1)(a) or (b) are met.

c. If a member being processed for separation or retirement for reasons other than physical disability adequately performed the duties of his or her office, grade, rank or rating, the member is presumed fit for duty even though medical evidence indicates he or she has impairments.

• • •

e. An evaluee whose manifest or latent impairment may be expected to interfere with the performance of duty in the near future may be found "unfit for continued duty" even though the member is currently physically capable of performing all assigned duties. Conversely, an evaluee convalescing from a disease or injury which reasonably may be expected to improve so that he or she will be able to perform the duties of his or her office, grade, rank, or rating in the near future may be found "Fit for Duty."

f. The following standards and criteria will <u>not</u> be used as the sole basis for making determinations that an evaluee is unfit for continued military service by reason of physical disability.

(1) Inability to perform all duties of his or her office, grade, rank or rating in every geographic location and under every conceivable circumstance. …

(2) Inability to satisfy the standards for initial entry into military service … .

• • •

(4) Inability to qualify for specialized duties requiring a high degree of physical fitness, such as flying … .

(5) The presence of one or more physical defects that are sufficient to require referral for evaluation or that may be unfitting for a member in a different office, grade, rank or rating.

(6) Pending voluntary or involuntary separation, retirement, or release to inactive status.

Chapter 3.D.7. states that a "member who is being processed for separation … shall not normally be referred for physical disability evaluation. … [A]bsence of a significant decrease in the level of a member's continued performance up to the time of separation or retirement satisfies the presumption that the member is fit to perform the duties of his or her office, grade, rank or rating (see paragraph 2.C.2.)."

Chapter 3 provides that if a member's fitness for continued duty is in question, an IMB of two medical officers shall conduct a thorough medical examination, review all available records, and issue a report with a narrative description of the member's impairments, an opinion as to the member's fitness for duty and potential for further military service, and if the member is found unfit, a referral to a Central Physical Evaluation Board (CPEB). The member is advised about the PDES and permitted to submit a response to the IMB report.

Chapter 4 provides that a CPEB shall review the IMB report, the CO's endorsement, and the member's medical records. Chapter 2.C.2.a. provides that the "sole standard" that a CPEB (or FPEB) may use in "making determinations of physical disability as a basis for retirement or separation shall be unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated through military service." Chapter 2.C.3.a.(3)(a) provides that, if a CPEB (or subsequently an FPEB) finds that the member is unfit for duty because of a permanent disability, it will propose a physical disability rating. Chapter 4.A.14.c. provides that if the member objects to a CPEB finding, he may demand a formal hearing by the FPEB. Chapter 5.C.11.a. provides that the FPEB shall issue findings and a recommended disposition of each case in accordance with the provisions of Chapter 2.C.3.a. (see above). The applicant may submit a rebuttal within 15 working days, and the FPEB must respond and, if indicated, prepare a new report. The FPEB's final report is reviewed for sufficiency by an officer at CGPC and by the Judge Advocate General, and forwarded to the Chief of the Administrative Division of CGPC for final action.

DoD Instruction 1332.39

Paragraph E2.A1.1.20.2. of Enclosure 2 of this instruction, which the Coast Guard uses as non-binding guidance, states with respect to a member's back pain that "[d]emonstrable pain on spinal motion associated with positive radiographic findings shall warrant a 10 percent rating. If paravertebral muscle spasms are also present, a 20 percent rating may be awarded. Such paravertebral muscle spasms, however, must be chronic and evident on repeated examinations."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The Board begins each case presuming that the applicant's records are correct and that Government officials, including doctors, have acted correctly and in good faith.[6] In BCMR Docket No. 2004-053, the Board found, based on the record at that time, that the applicant had not proved by a preponderance of the evidence that the Coast Guard's refusal to process him under the PDES prior to his release from active duty was erroneous or unjust. This Board concurs in that finding because, although the applicant was being treated for pain and tingling, he served regularly on active duty up until the time he opted to leave active duty by rejecting another active duty contract, and because his doctor found him fit for duty and noted that there were no limitations on his deployment. Chapter 2.C.2.b. of the PDES Manual provides that the Coast Guard's own "disability evaluation system [is] not to be misused to bestow compensation benefits on those who are voluntarily or mandatorily retiring or separating and have … continued on unlimited active duty status while tolerating physical impairments that have not actually precluded Coast Guard service." Service-related medical conditions that affect earning capacity after separation from active duty are handled by the disability evaluation and benefits system of the Department of Veterans' Affairs.

4. In BCMR Docket No. 2004-053, the Board ordered the Coast Guard to conduct a physical examination of the applicant to determine his fitness for duty because the record showed that Dr. R had doubts about his fitness for duty prior to his release on June 30, 2002, and that the applicant was suffering from impairments that might have interfered with his performance of duty in a more physically demanding assignment. The Coast Guard implemented the Board's order by having Dr. N conduct a physical examination of the applicant on December 1, 2004. Dr. N concluded that the applicant was fit for duty on that date and that he would not recommend evaluation by a medical board.

---

[6] 33 C.F.R. § 52.24(b). *See Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979) (holding that "absent strong evidence to the contrary," government officials are presumed to have acted "lawfully, correctly, and in good faith").

5. Dr. N also noted that he would not recommend the applicant for enlistment "based upon his numerous complaints that can't be supported with physical findings on his exam." In essence, this means that Dr. N found the applicant fit for duty but not fit for enlistment. The physical standards for enlistment and those for retention on active duty are quite different. The physical requirements for enlistment listed in Article 3.D. of the Medical Manual are more stringent than those for retention listed in Article 3.F. Therefore, Dr. N's statement that he would not recommend the applicant for enlistment does not contradict his finding that the applicant was fit for duty.

6. The applicant alleged that his examination by Dr. N on December 1, 2004, was "perfunctory and deficient" and that Dr. N's finding that the applicant was fit for duty is erroneous. The applicant alleged that the report of Dr. A dated January 12, 2005, proves that he was not fit for duty. It is clear from Dr. A's report that the applicant was being treated for chronic mechanical thoracic back pain, left ulnar neuropathy, hearing loss, tinnitus, migraine headaches, and depression. However, being "fit for duty" does not mean that a member has no impairments.[7] Members may be fit for duty and retained on active duty without PDES processing even though they suffer from impairments as long as those impairments do not prevent them from reasonably performing their assigned duties.[8] Nothing in Dr. A's report proves that the applicant's impairments rendered him incapable of reasonably performing the duties of a lieutenant in the Coast Guard.

7. In particular, the Board notes that Dr. A did not describe any of the applicant's conditions as severe or debilitating. Under Article 3.F.12. of the Medical Manual, nerve pain may be disqualifying for retention when "symptoms are severe, persistent, and not responsive to treatment." Under Article 3.F.15.n.(2), nerve inflammation that causes pain and numbness may be disqualifying "when manifested by more than moderate, permanent functional impairment." The Medical Manual does not specifically address the source of the applicant's back pain, but back pain from a herniated disc is only disqualifying if there are "[m]ore than mild symptoms … with sufficient objective findings to demonstrate interference with the satisfactory performance of duty."[9] Moreover, DoD Instruction 1332.39, which the Coast Guard uses as guidance, requires "demonstrable pain on spinal motion associated with positive radiographic findings" to award even a 10% rating. Dr. A's report does not prove that either the applicant's ulnar neuropathy or thoracic pain—the residual symptoms stemming from his motorcycle accident—meets these standards. Nor did Dr. A state that the applicant's conditions prevent him from working.

---

[7] Chapter 2.A.15. of the PDES Manual defines "fit for duty" as "[t]he status of a member who is physically and mentally able to perform the duties of office, grade, rank or rating."

[8] Medical Manual, Article 3.F.1.c.

[9] Medical Manual, Article 3.F.13.c.

8. The applicant argued that the fact that the DVA has awarded him a 30% disability rating proves that he is not fit for duty and should have been processed under the PDES. Under *Lord v. United States*, 2 Ct. Cl. 749, 754 (1983), DVA ratings are "not determinative of the same issues involved in military disability cases." Under Chapter 2.C.2.a. of the PDES Manual, the Coast Guard considers to what extent a member is permanently disabled by a condition that renders him unfit for duty, whereas the DVA considers the extent to which a veteran's current earning capacity is diminished by the disability. Therefore, disability ratings assigned by the DVA do not prove that the Coast Guard's determination that the applicant was fit for duty is erroneous or unjust. Moreover, the Board notes that the applicant's 30% combined rating includes a 10% rating for tinnitus, which was diagnosed before the applicant's return to active duty in May 2000 and did not interfere with his performance of duty; a 10% rating for headaches, which were also diagnosed before his return to active duty in May 2000 and did not interfere with his performance of duty; and a 10% rating for depression. There is no evidence in the record that the applicant's symptoms of depression interfered with his performance of duty. Furthermore, the conditions for which the applicant sought PDES processing in BCMR Docket No. 2004-053 and those which caused Dr. R to express some doubt about his fitness for duty were the physical conditions resulting from his motorcycle accident—i.e., ulnar neuropathy and healed fractures of his clavicle and ribs—and the DVA has rated each of those at 0%. Moreover, the DVA's examination results strongly support Dr. N's finding that the applicant was fit for duty as the DVA examination found "no current functional deficit" due to the ulnar neuropathy, which tests revealed was mild; "no range of motion deficit and no pain, fatigue, weakness, lack of endurance or incoordination on ranging" due to the healed clavicle fracture; and "no functional impairment" due to the healed rib fractures.

9. Dr. N—who, as a Navy doctor, presumably has more experience than Dr. A in determining whether members are fit for duty—found that the applicant had "no problems with motion or strength in arms or legs, [or] trouble with balance or gait." Under Articles 3.F.12. and 3.F.13. of the Medical Manual, the strength and range of motion of a member's limbs and torso are important concerns in determining his fitness for duty. Dr. N reported that the applicant had a free range of motion and normal sensation in his extremities. Dr. N did note that the applicant's symptoms might have been masked by his medications. However, he still found the applicant fit for duty and stated that he would not recommend that the applicant be evaluated by a medical board. The applicant has not proved that his physical examination by Dr. N was deficient. Nor has the applicant proved that Dr. N failed to exercise sound medical judgment in finding that he was fit for duty.

10. While it clear from the record that the applicant suffers from certain impairments, he has not proved by a preponderance of the evidence that Dr. N erred in finding him fit for duty or in not recommending that he be evaluated by a medical

board. Nor has he proved that the Coast Guard committed an error or injustice in refusing to process him under the PDES.

11. Accordingly, the applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of xxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.